

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

MISC. APPLICATION No. 74 of 2005

SMT. YOGESHHWARI KUMARI
V/S
ARVIND SINGH MEWAR & ORS

Mr. VIVEK PATWA for Mr. JP JOSHI, for the appellant /
petitioner

Mr. MS SINGHVI and Mr. ARUN BHANSALI for Mr. LR MEHTA,
for the respondent

Date of Order : 3.9.2007

HON'BLE SHRI N P GUPTA, J.

ORDER

This misc. Application has been filed by the petitioner, one of the legatees, under Section 301 and 302 of the Indian Succession Act, 1925, hereafter referred to as the Act. Though the application is long one, however the prayer made is, that Shri Arvind Singh Mewar be removed as executor of the Will of testator, and that the petitioner, and/or some other person be appointed as executor of the Will, other relief has also been claimed, that certain shares issued to certain companies without administering the Will are liable to be cancelled, or in the alternative some declaration is sought for. Then it is prayed, that the respondent no.1 (Shri Arvind Singh Mewar) be ordered to be prosecuted for various offences committed by him as executor of the Will, and some more directions have been prayed for.

The relevant allegations are, that in the Will, the testator had appointed the executors, being Shri Arvind Singh Mewar, the respondent no.1, and late Shri A. Subramaniam. It is alleged that after grant of probate, the executor ought to have administered/executed the Will by giving effect to its various provisions, but instead, the respondent no.1 has been using/abusing the grant of probate in his favour to further his own individual interests, to the great detriment of the estate of the testator, and the beneficiaries thereunder, and is systematically acting in the manner, claiming to be proprietor of the estate. It is also alleged, that after the death of A. Subramaniam steps have not been taken for filling up the vacancy. According to the petitioner, if the respondent no.1 is allowed to continue as executor of the Will, the day is not far off when nothing will be left in the Will to administer, since by that time the executor, in his individual capacity, will acquire exclusive and complete control of the estate. Then, some details are pleaded regarding the acts done by the respondent qua different properties. Reference has been made to certain company petition proceedings as well. It is alleged, that by the conduct of respondent no.1, he has rendered himself liable for removal as executor forthwith.

This application was filed in the year 2005. Then, vide order dt. 9.12.2005 notice of this application as well as of interim application, were issued. A bulk of documents have also been filed along with the application.

A reply to this application has been filed on behalf of respondent no. 4 in January, 2006, alleging interalia, that this respondent is the son of eldest brother of the executor, and owing to various compulsions his father had to file a suit for partition of the estate, being suit no. 243/2004, wherein status quo order/injunctions have been issued by the District Court, which have been affirmed by the High Court, and Hon'ble the Supreme Court since 23.4.83, extracts thereof have been produced as Annexure B, annexed to the reply. According to this Annexure-B, District Court, Udaipur vide order dt. 2.12.1985 restrained Shri Arvind Singh from disposing and/or alienating or otherwise dealing with the suit properties, till the decision of the suit, and the High Court, vide order dt. 11.6.93 further restrained Shri Arvind Singh as an executor of the Will, his agents, servants or officers, from disposing and/or alienating, or otherwise dealing with the suit properties, till the decision of the suit, and Hon'ble the Supreme Court passed the order dt. 3.11.1992, directing Shri Arvind Singh, to maintain status quo, and not to make any structural alteration, in the building in question. Then, vide order dt. 2.4.93, Hon'ble the Supreme Court directed the trial court to dispose of the suit as expeditiously as possible, preferably within 8 months from that date. Few more orders have been detailed in this Annexure-B, which need not detain me. Certain observations made in the order of the

grant of probate have also been reproduced. Then, disputes have been raised about validity of the Will, its workability, and so on. It is pleaded that this answering respondent filed company petition before the Company Law Board, and the order passed thereon have also been incorporated. Then, specific pleadings have been taken about various properties. Then, replying the prayer, it was pleaded, that the estate of testator can only be dealt with after disposal of the partition suit, the contents of the Will, are in themselves contradictory, not valid, and cannot be executed, therefore, it is immaterial as to who is the executor of such an unworkable document. Then, certain counter prayers have been made. Further direction have been sought to be issued to the District Court concerned.

A reply has also been filed on behalf of respondent no.1, the executor, on 29.8.2006. It is interalia contended therein, that the petitioner is not entitled to file the present application on behalf of Maharana Mewar Institution Trust (MMIT), as till the administration of the Will of the testator is not complete, no one can claim to be the chairperson of a non-existent body. Then, the application is pleaded to be barred by principles of res-judicata, constructive res-judicata, and/or on the principle of issue estoppel. Then, it is pleaded that on the allegations levelled in respect of certain properties, interalia making same or similar

allegations, raising identical issues, grievances, and seeking same reliefs, a Company Petition No. 1/91 was filed, which has been decided by the Company Judge on merits on 23.11.1994. This judgment is reported in 1995(3) Comp. L.J. 418. It is alleged that against this judgment special appeals were filed, and during pendency of the appeal, the matter was compromised thereafter, and according to the compromise the applicant withdrew the company petition, and consequently all the three appeals were dismissed, therefore, now the petitioner cannot be allowed to file the present application on the same grounds. It is also pleaded that the petitioner also moved Application No. 17/94, seeking injunction against the respondent, restraining him from exercising any rights in respect of certain shares, which was duly replied, and withdrawal of the company petition, as well as this application, operates as res-judicata. Then, it is pleaded that the applicant has suppressed material facts, and made allegations which are incorrect to her knowledge. It was pleaded that the petitioner had filed incomplete documents, and the respondent has pleaded to be placing on record complete documents, which were filed as per directions of this Court dt. 11.6.93, in Civil Misc. Appeal No. 179/86, and are marked as Annexure R1/3. Then, it is also pleaded that the application is barred by limitation, as the incidents relied upon relate to the year 1985, 1987, 1990, and in any case the application deserves to be dismissed on account of laches. It is also pleaded that the

transactions effected by concerned parties cannot be reopened, or set at naught. It is also pleaded that the condition precedent for approaching this Court under Section 301 and 302 is also completely non-existent, and the present application is required to be dismissed. The application was also claimed to be lacking bonafide, rather it is filed to build pressure on the respondent. no.1. Then, parawise reply has also been incorporated, and it was denied that answering respondent no.1 is using /abusing the grant of probate in his favour to further his own individual interest. It was pleaded that the applicant is levelling absolutely false, baseless and highly malafide allegations. Then, it was pleaded that in view of the order of this Court dt. 11.6.93, the respondent is not in a position to transfer moveable and immoveable properties from the executor to the beneficiaries. It was pleaded that the answering respondent has all through acted diligently, bonafide and in the best interest of the estate, in consonance with the Will, under the Act of 1925, in the discharge of his duties as the executor, and no acts of misfeasance, malfeasance or nonfeasance have been committed. Then, it was also pleaded that so far the death of Shri A. Subramaniam is concerned, when probate has been granted to several co-executors and one of them dies, the entire representation of the testator accrues to the surviving executor or executors, and as such there is no failure on the part of respondent no. 1 in not filling up the vacancy. It was also pleaded, that the petitioner has

no right to appoint executor in place of Shri A. Subramaniam. Then, it is also pleaded that as an executor, the respondent no.1 is duty bound to exclusively manage the estate, and in view of interim order passed in the partition suit, he is not in a position to fully administer the Will. It is also pleaded that from Annexure R 1/3 it is clear, that answering respondent has accounted for each and every moveable and immoveable property, received by him as executor of the Will, and as executor, the answering respondent has also filed inventory in the present proceedings i.e. S.B. Testamentary Case No. 1/85, and as such the allegations are false. It was pleaded that there is no question of the respondent being disqualified to continue as executor. It was also pleaded, that the petitioner having failed before the forums under the Companies Act, is seeking to misuse the present proceedings for ventilating her baseless grievances, and execute her malafide intentions. Then, factual averments, made with respect to each of the property, have been denied. It was pleaded that there is specific injunction against the answering respondent, from transferring and/or alienating and /or dealing with moveable and immoveable properties, and that till such time that the residue of the estate is ascertained, there is no question of handing over the same to the beneficiaries. It was pleaded, that the petitioner being elder sister of the respondent no.1, is always welcome in Shambhu Niwas Palace, and that he has never refused the petitioner to temporarily use Shambhu Niwas,

rather when the mother of the petitioner and the respondent was alive, the petitioner invariably used to reside and stay with her, during her visits to Udaipur, in the upper portion of Shambhu Niwas Palace. Interalia with these averments, it is prayed, that the application be dismissed.

Then, a rejoinder was filed by the petitioner on 5.4.2007. It is contended, that certain facts emerged to be admitted ones from the pleading, viz. that the restraint order against the answering respondent is in the suit filed by his elder brother, that the trust would come into existence only after the Will is administered, and that the applicant by her own conduct is estopped from raising the objections contained in the application under Section 301 and 302 of the Act, having acquiesced, and that the applicant must be deemed to have waived any objection. However it is contended, that above facts are sufficient for allowing the application. It is contended that so far injunction in suit no. 243/2004 is concerned, the respondent is relying on injunction to perpetuate his own rule and control over the estate, and the petitioner has produced the injunction order as Annexure P-11, purporting to be order of injunction, whereby status quo has been maintained, and it was modified by the order of this Court dt. 11.6.93, and that, these orders do not, in any way, restrain respondent no.1, and that the restrain is against the transfer of property, and not against implementation of the Will, and implementation of the Will cannot, by any

stretch of imagination, be construed as a transfer, covered by the aforesaid order of temporary injunction, and that, the implementation of the Will does not, and cannot, constitute a transfer, by the executor, in favour of the applicant, or other legatees. It is also contended that the aforesaid defence cannot be countenanced for the reason, that the same is not available to him, in view of his own conduct, attempting to rely on an order which is against him, to perpetuate his own rule and control over the estate. Various other pleadings have been taken.

Then a sur-rejoinder has also been filed, along with which certain more documents have been filed, including the application filed by the respondent no.1 under O. 39 Rule 4, seeking modification of the interim injunction, and praying therein, that the present respondent no.1 be permitted to proceed with execution of the Will, and administration of the properties. Copy of this application has been filed as Annexure R 1/9. Annexure R1/10 has been filed purporting to be reply to that application on behalf of present petitioner, opposing that application, and some more documents have been filed.

The matter came up for consideration on 18.7.2007. Then on 17.8.2007, on which date Mr. Joshi informed, that they have filed application for modification of the interim order before the Court at Udaipur, so also for impleadment of party, while Mr. Bhansali submitted,

that they have filed an application under O. 39 Rule 4, which application is being opposed by the petitioner, therefore, the matter was adjourned for two weeks, with a direction to the parties, to produce material on record, in support of their respective stand. Thereafter the matter came up on 3.9.2007, on which date learned counsel for the respondent invited my attention to Annexure-R1/9, and submitted that the respondent with all earnest had filed an application for modifying interim injunction, and prayed for injunction to permit the respondent, to administer the Will, which application is being opposed by the present petitioner. To this learned counsel for the petitioner submitted, that of course they are opposing that application, but then they have filed an application for modification of the interim order, before the High Court.

The net out come of the submissions is, that according to the respondent no.1, the interim injunctions in the partition suit are operating. The question is, that according to the petitioner, those injunctions do not prevent the respondent, from administering the estate, while the respondent feels that it does.

In that view of the matter, the respondent filed application Annexure R 1/9, to seek direction, to permit the executor to administer the estate. Admittedly, that application is being opposed. I expressly put to the learned counsel for the petitioner, as to whether he is

prepared to agree to that application, so as to entitle the respondent no.1 to proceed with administration of the estate, as executor, to which learned counsel for the petitioner, expressly declined.

In view of the above, of course various pleadings have been taken in this bulky petition, by the petitioner, alleging good amount of slur against the respondent no.1, to be not acting as executor, and on the other hand the executor has taken the stand, that in view of the injunction order passed in the partition suit, his hands are tied, and respecting Court's order, he cannot administer the estate, and precisely for this reason, he has filed application Annexure R1/9, to which the petitioners are not agreeable.

Thus, in my view, the net situation that boils down to, is that, on the face of the injunction order, passed by the District court, in partition suit, as affirmed by this Court, and by Hon'ble the Supreme Court, modification whereof, as claimed by the respondent no.1 is being opposed by the petitioner, it cannot be said, that the respondent, has deliberately, or wilfully, failed to discharge his duties, as executor, so as to render him liable to be removed, and/or to direct a fresh executor to be appointed.

Consequence of the aforesaid discussion is, that

I do not find any force in the application, and the same is, therefore, dismissed.

/Sushil/

(N P GUPTA),J.